BANK BUMIPUTRA (M) BHD.

v.

SYKT. SUNGEI LESONG SDN. BHD. & ORS.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT 23-462-86]
3 OCTOBER 1988

CONTRACT: *Bank guarantee - Limit of guarantee - Guarantors liability to extent of limit.*

The second and third defendants had appealed against the decision of the Senior Assistant Registrar who entered summary judgment for sum of RM3,946,554.23 with interest at 15.25% per annum until date of satisfaction and costs. Judgment in default for the same sum was awarded against the first defendant who was the principal borrower. The second and third defendants were the guarantors. The issue was the construction of the guarantee agreement, i.e., limit of the amount of the guarantee.

Held:

[1] The guarantee agreement provided that the guaranteed sum was RM2.2 million. Thus, judgment for the sum of RM2.2 million was entered against the second and third defendants being the limit of the amount of guarantee.

[2] The contractual interest which was agreed at 15.25% per annum was allowed by virtue of O. 42 r. 12, Rules of the High Court 1980.

[Order of Senior Assistant Registrar varied.]

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 42 r. 12

For the plaintiff - Lalchand Nathermal; M/s. Lalchand, Nawawi; Phang & Co.
For the defendants - Kulasegaran; M/s. Kula-Cheng & Co.

JUDGMENT

Peh Swee Chin J:

On an appeal from an order of the learned Registrar granting leave under an O. 14 application to enter judgment against both 2nd and 3rd defendants for the sum of RM3,946,554.23 with contractual rate of interest at 15.25% p.a. until satisfaction and costs of RM350, I dismissed the appeal except that judgment sum was reduced to RM2.2 million with interest at 8% p.a.

The plaintiff bank has now appealed against the reduction of the judgment sum to RM2.2 million with effect from 4 July 1986, (being the date when leave to enter judgment was granted by the learned Registrar) with interest at the rate of 8% p.a. I now give my grounds for such reduction. The reduction pivoted on the question of the limit of the amount of guarantee in respect of which, learned Counsel for the plaintiff bank submitted practically to the effect, that there was no such limit, with the learned Counsel for 2nd and 3rd defendants submitting to the contrary.

Judgment in default had already been entered against 1st defendant, the principal borrower for the sum of RM3,946,554.23 with interest and cost aforesaid by the time the O. 14 application for summary judgment came up before the learned Registrar as regards 2nd and 3rd defendants, who were guarantors for the 1st defendant by virtue of a letter of guarantee dated 21 April 1980.

The issue therefore turned on certain clauses of the letter of guarantee cited by the Counsel, which are now set out below:

1. I/We will pay you on demand as follows:

(i) The sum of Ringgit Two million and two hundred thousand only (RM2,200,000) (hereinafter called "the guaranteed sum") and any part of the money hereby guaranteed which is now or shall at any time be owing or remain due and unpaid to you from the borrowers.

(ii) Interest at the rate of 2% above prime per annum or at such other rate as may be determined by the bank from time to time.

(iii) Commission and other expenses and all cost charges and expenses which you may incur in enforcing or seeking to obtain payment of all or any part of the moneys hereby guaranteed and to make good any default by the borrower or its successors-in-title in payment of the sum hereby guaranteed or any part thereof.

2. This guarantee shall not be considered as revocable or satisfied by any intermediate payment of any part of the principal sum or any payment referred to in clause 1 above by the borrower but shall be a continuing guarantee and shall extend to cover any sum or sums of money which shall from time to time constitute the balance due from the borrower to you.

3. ...

4. All moneys received from or on account of the borrower or from any other person or estate or from the realisation of any security or otherwise for the purpose of being applied in reduction of the money in clause 1 abovementioned shall be treated for all purposes as payments in gross and not as appropriated or attributable to any specific part of item of the said money even if appropriated thereto by the person otherwise entitled so to appropriate. All securities now or at any time held by you shall be treated as securities for the said general balance. We will make no claim to such securities or any part thereof or any interest therein unless and until I/ we have paid all money due from me/us under this guarantee and you shall have received the full amount of such general balance including interest thereon.

5. Should the borrower become bankrupt or insolvent or being an incorporated company shall be wound up, you may prove in the bankruptcy or winding up of the borrower for the whole amount outstanding against the borrower on such general balance and no money or dividend so received by you shall be treated as received in respect of this guarantee or otherwise in relation to me/us, but the full amount hereby guaranteed shall be payable by me/us until you shall have received from all sources one hundred cents in the dollar on the ultimate balance outstanding against the borrower. After you have received such ultimate balance in full any claim on any part to any excess or any securities remaining in your hands shall be a matter of adjustment between you, me/us and any other person or persons laying claim thereto.

6. Any accounts settled or stated by or between you and the borrower or admitted by or on behalf of the borrower and duly certified by one of your officers may be adduced by you and shall in that case be accepted by me/us as conclusive evidence that the balance or amount thereby appearing is due from the borrower to you and payable on demand by me/us.

7. ...

8. ...

9. ...

10. As a separate and independent stipulation I/we agree that all sums of money not recoverable from me/us on the footing of a guarantee whether by reason or any legal limitation, disability or incapacity on or of the borrower or any other fact or circumstance and whether known to

you or not shall nevertheless be recoverable from me/us as a principal debtor or debtors in respect thereof and shall be repaid by me/us seven days after demand in writing made by you or on your behalf.

Of the clauses referred to by both learned Counsel, the obviously most telling one would be clause (1). Clause 1(i) referred to repayment of RM2.2 million on demand, "hereinafter called the guaranteed sum."

The express mention of "the guaranteed sum", in my view, would appear to make the said RM2.2 million the ceiling of the guarantee. This impression was immediately blurred somewhat by the word "and", suggesting that the limit could be RM2.2 million plus any part of the money hereby guaranteed. The blurring effect was also further and at once cleared by the following words following immediately the word "and"; viz "and any part of the moneys hereby guaranteed". The word "and" should therefore be read disjunctively and not conjunctively and further reasons are given below.

If the contention of learned Counsel for the plaintiff/bank was right, the express mention of RM2.2 million as "the guaranteed sum" would be utterly redundant, serving no purpose other than one of cosmetic appearance. In my view, however, since the figure was mentioned in this way, unless the Court was driven irresistibly to a conclusion of repugnancy with other clauses, Court should strive to give effect to the intention of parties if the words employed by them could give rise to such an intention; for *ut res magis valeat quam pereat*. Further, the words: "... any part of the moneys hereby guaranteed" could only mean any part of the "guaranteed sum", viz. the RM2.2 million hereby guaranteed, these words should mean any sum falling short of the RM2.2 million.

Clause 4 was relied by the plaintiff/bank as meaning that there was no such limit of RM2.2 million - by virtue of especially the words: "... you shall have received the full amount of such general balance including interest thereon." These words must be read together with the earlier words in the same clause viz. "... until I/we have paid all money due from me/us **under this guarantee.**" The emphasis is mine. To rely on this clause 4 would, therefore, rather beg the question than solve it; and they did not have the effect that learned Counsel said they had.

Again learned Counsel for the plaintiff/bank relied on the following words of clause 5: "... you shall have received from all sources one hundred cents in the dollar on the ultimate balance outstanding against the borrowers". These words however were again immediately preceded by the words: "The full amount hereby guaranteed shall be payable by me/us until ..." The "full amount hereby guaranteed" must have again referred to the limit of the amount of guarantee of RM2.2 million, the "guaranteed sum.

The other points relied on by learned Counsel would only reinforce and fortify the view that the limit was the RM2.2 million as spelt out rather than that the words of RM2.2 million as the "guaranteed sum" were meaningless.

I should mention that I agree that interest of 8% p.a. should be reverted to 15.25% p.a. as claimed, as O. 42 was amended by P.U. (A) 445/86 allowing for contractual rate of interest for judgment sum instead of 8% p.a. which was earlier held by the Supreme Court as the maximum permissible rate of interest under the preamendment O. 42 r. 12 of the Rules of the High Court.

Also found at [1989] 1 CLJ 430